

MALAYAN FLOUR MILLS BHD

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v.

TEH WEE KOK

HIGH COURT MALAYA, KUALA LUMPUR

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ABDUL WAHAB SAID J

[ORIGINATING SUMMONS NO: 24-171-2004]

5 AUGUST 2005

CIVIL PROCEDURE: *Time - Extension of time - Application for extension of time to file summons in chambers to set aside court's order - Rules of the High Court 1980, O. 42 r. 13*

c

The respondent filed an application (encl. 26) under O. 3 r. 5 of the Rules of the High Court 1980 for an extension of time to file his summons in chambers (encl. 13) to set aside the court's order of 17 June 2004 and to declare the Extraordinary General Meeting ('EGM') held on that date invalid. The applicant was a public listed company and the respondent was a director of the applicant at the material time. Briefly, the facts were that on 16 June 2004, the applicant had received representations submitted by the respondent pursuant to s. 128 of the Companies Act 1965 and subsequently on 17 June 2004, the applicant's solicitors obtained the order under s. 128(4) Companies Act 1965 from this court that the representations of the respondent need not be sent out to the members and need not be read out at the EGM. The EGM proceeded, and the respondent was removed as a director by majority of votes of the shareholders. The respondent filed encl. 13 pursuant to O. 42 r. 13 of the Rules of the High Court 1980 on 6 August 2004 although the last day for filing it was 4 August 2004 while encl. 26 for extension of time to file encl. 13 was filed on 11 March 2005 *ie*, seven months and seven days from service of sealed order. The respondent's grounds in making the application for extension of time to file encl. 13 were (1) that the respondent required time to prepare and affirm encl. 13 and the affidavit in support and (2) that the purported delay was only two days and that no substantial miscarriage of justice had been occasioned to the applicant.

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a Held (allowing application for extension of time to file respondent's application in encl. 13):

b [1] The respondent should not be barred from filing his application because of the mere two-day delay, being 32 days after the service of the cause papers by the applicant's solicitors on 5 July 2004. The fact that the applicant had responded to the respondent's application in encl. 13 showed there was no miscarriage of justice or prejudice to the applicant. Applications of extension of time must be made early but the fact that it was made late should not be a ground for refusal of court's exercise of discretion. The fact that voluminous exhibit had to be filed in their application under encl. 13 resulting in a delay of two days in filing it should be sufficient ground to grant this application notwithstanding the absence of explanation of delay in filing the application in encl. 26. The respondent should not be denied his day in court to pursue his substantive arguments for setting aside the order of 17 June 2004. This was a fit and proper case for the court to exercise its discretion. There was no way the applicant could possibly have suffered any injustice or prejudice. (pp 216 h & 217 a-e)

Legislation referred to:

e Companies Act 1965, ss. 128(4), (7), 144, 145
Rules of the High Court 1980, O. 3 r. 5, O. 41 r. 13, O. 42 r. 13

For the applicant - Bahari Yeow; M/s Lee Hishamuddin Allen & Gledhill
For the respondent - Conrad Yong (Elizabeth Loo with him); M/s Sivanathan

Reported by Suhainah Wahiduddin

f JUDGMENT

Abdul Wahab Said J:

g The respondent filed an application (encl. 26) under O. 3 r. 5 of the Rules of the High Court 1980 for an extension of time to file his summons in chambers dated 6 August 2004 (encl. 13), to set aside the Court's Order of 17 June 2004 and to declare the EGM held on that date invalid.

h The applicant is a public listed company. At the material times, the respondent was a director of the applicant and held about 1.89% of applicant's shareholding. On 19 May 2004, the applicant issued two notices of meeting, namely:

- i** (a) 44th Annual General Meeting ("AGM"); and
(b) Extraordinary General Meeting ("EGM");

Both the AGM and EGM were to be held on 17 June 2004. The AGM was fixed at 9.30am, and the EGM at 10.30am or immediately after the conclusion of the AGM. The agenda for the EGM was to consider an ordinary resolution to remove the respondent as a director of the applicant with immediate effect.

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On 16 June 2004 at about 3.30pm the applicant received representations submitted by the respondent pursuant to s. 128 of the Companies Act 1965. Applicant then instructed solicitors to apply under a certificate of urgency for an order under s. 128(4) of the Companies Act 1965. On 17 June 2004 the applicant's solicitors obtained the order under s. 128(4) Companies Act 1965 from this court that the representations of the respondent need not be sent out to the members and need not be read out at the EGM. A sealed copy of the draft order was served on the respondent at the EGM. The EGM proceeded, and the respondent was removed as a director by majority of votes of the shareholders.

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On 6 August 2004, the respondent filed encl. 13 pursuant to O. 42 r. 13 of the Rules of the High Court 1980. It would appear the last day for filing encl. 13 would be 4 August 2004. Enclosure 13 was filed two days late on 6 August 2004 while encl. 26 for extension of time to file encl. 13 was filed on 11 March 2005, ie, about seven months and seven days from service of sealed order.

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The respondent's grounds in making the application for extension of time to file the application are that firstly, the sealed order dated 17 June 2004 and the various cause papers and affidavits were first served on the respondent's solicitors on 5 July 2004, and further affidavits were served on the respondent's solicitors on 12 July 2004. The second ground was that the respondent required time to study the facts and the law relating to this action and to prepare, compile and affirm the summons in chambers dated 6 August 2004 (encl. 13) and the affidavit in support. The respondent was advised by his solicitors that the issues arising in this case are issues upon which there are no known local authorities on the matter. The preparation of encl. 13 took time, particularly the affidavit in support, which ran into 11 volumes, containing 3,631 pages in all, including exhibits.

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The third ground is that the purported delay is only two days and finally that no prejudice or substantial miscarriage of justice has been occasioned to the applicant. The applicant had ample opportunity to respond to encl. 13 and indeed, they have responded.

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- a* It is trite law that the Rules of Court must be obeyed. Application for extension of time during which some steps in procedure are required to be taken, must contain satisfactory grounds to merit the extension, before the court would exercise its discretion. Court has a wide discretion and has in proper and deserving cases granted extensions of time. Order 1A of Rules of High Court
- b* had expanded this discretion as the court or judge shall have regard to the justice of the particular case and not only to the technical non compliance of any of the Rules therein. The respondent had explained the two days' delay before filing encl. 13 but did not explain the delay of seven months and seven days when making the application under encl. 26.
- c* Learned counsel for applicant said it will cause prejudice and occasioned substantial miscarriage of justice to the applicant. The applicant would be deprived of its right to have its legal argument put before this court that encl. 13 should be dismissed for non compliance of O. 41 r. 13. That right of the applicant is an important statutory right as provided under O. 42 r. 13 of RHC.
- d* He further contended that all necessary actions had been taken by the applicant to inform the Bursa Malaysia and Companies Commission of Malaysia on the removal of the respondent as a director of the applicant effective on 17 June 2004. The respondent has various other remedies, *inter alia* he could seek damages under s. 128(7) of the Companies Act 1965 if he can prove
- e* that the removal was wrongful or he could convene an extraordinary general meeting of the appellant under ss. 144 and 145 of the Companies Act 1965 for the purpose of electing him as a director.
- f* He next submitted that the evidence shows that encl. 13 is now academic. In the originating summons, the applicant has sought and obtained an order that the representations should not be sent out or read at the EGM or at any adjournment thereof. The EGM is now over, and the resolution to remove the respondent as a director of the applicant was duly passed and approved by members at the EGM. There is no living issue before the Honourable Court
- g* in so far as the originating summons is concerned. The date 17 June 2004, and the prayer for the representations not to be sent and read at the EGM would not come alive again. The order has been fully implemented. It is trite law that the court will not hear a case in deciding an academic question.
- h* Having heard both parties in this application, I find that the respondent's application, if granted, will not cause any miscarriage in justice to the applicant. The delay is a mere two days. I do not think that the respondent should be barred from filing his application because of the two days delay, being 32 days after the service of the cause papers by the applicant's solicitors on 5 July 2004. The fact that the applicant had responded to the respondent's application
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in encl. 13 showed that there is no miscarriage of justice or prejudice to the applicant. In fact the applicant filed 7 affidavits in reply. Applications for extension of time must be made early but the fact that it is made late should not be a ground for refusal of court's exercise of discretion. The fact that voluminous exhibit had to be filed in their application under encl. 13 resulting in a delay of two days in filing it should be sufficient ground to grant this application notwithstanding the absence of explanation of delay in filing the application in encl. 26. As to whether encl. 13 will be academic, I am not prepared to say respondent's legal recourse is limited to s. 128(7) of the Companies Act 1965. This could be ventilated further in the substantive arguments on setting aside of the order. At the end of the day the court will have to consider the injustice if any caused to the applicant. The applicant's contention that it would be deprived of its right at the hearing of encl. 13 to object to the procedural non-compliance by the respondent is without merit. The applicant had already raised it in opposition to this application for extension of time. The respondent had acted diligently in pursuing the setting aside of the *ex parte* order. He should not be thwarted from pursuing the setting aside application because of his failure to give reasons for delay in filing encl. 26. The court should be more lenient in these applications where the order had been obtained *ex parte*. To my mind, the overriding consideration is that the respondent should not be denied his day in court to pursue his substantive arguments for setting aside the order of 17 June 2004. This is a fit and proper case for the court to exercise its discretion and excused the respondent for the absence of the reasons for the delay in filing encl. 26. There is no way in which the applicant could possibly have suffered any injustice or prejudice on this non compliance. Hence, I allowed the respondent's application for extension of time to file his application in encl. 13 with costs to applicant.

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